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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ELIZABETH GUERRERO,

Defendant and Appellant.

D037149

(Super. Ct. No. SCN 105808)

APPEAL from a judgment of the Superior Court of San Diego County, Harry Elias, Judge. Affirmed.

Following the denial of her motion to suppress evidence, Elizabeth Guerrero was convicted by jury of resisting an executive officer and of transporting, possessing for sale and possessing methamphetamine. On this appeal Guerrero argues evidence should have been suppressed because it was found in a detention without probable cause, the resisting conviction should be reversed for this reason also, and she last argues that the possession

conviction must be reversed as necessarily included in the transportation conviction. The People agree with the last point, and we so order, but otherwise affirm the judgment.

BACKGROUND

A. Procedure

Prior to trial, Guerrero filed a motion to suppress, arguing her vehicle was detained without probable cause, there was no justification for the police having ordered her to get out of her detained car, and the evidence discovered thus should be suppressed. In a responsive memorandum, the People asserted that two Vehicle Code violations, lack of a license plate and a broken taillight, justified the stop and detention.

B. Evidence

At the suppression hearing, the following facts were elicited.¹ In the late evening hours of November 14, 1999, Escondido officers Rudisell and Jennings² responded to a call about a gang party with loud music at 419 East 8th Avenue, a known hangout for the Westside Gang. At the 8th Avenue location, Rudisell did not hear music, but he did observe a vehicle operated by Guerrero which had no rear license plate and a broken taillight. Rudisell did not see a temporary operating permit on the vehicle, and Jennings made no remark about observing one.

¹ As the appellant arguments concern the motion to suppress, we do not recite the evidence introduced at trial, but only the evidence on the motion to suppress.

² Although Rudisell and Jennings both testified at trial, only Rudisell testified at the hearing on the suppression motion.

Rudisell approached the driver, Guerrero, while Jennings went up to the passenger side, where Guerrero's female passenger, Savedra, was sitting. Rudisell told Guerrero he was stopping her because of the missing license plate, asked her who owned the car, and for her identification. Guerrero said something about the car needing to be smogged, and that her identification was in her purse. Meanwhile, the passenger, Savedra, was not complying with repeated requests from Jennings to keep her hands in view.

Concerned about the problems Jennings was having with Savedra, Rudisell asked Guerrero not to go into her purse, and to turn the engine off and get out of the car, which she did. Rudisell then asked Guerrero to go to the rear of the vehicle, which she did. On the other side of the car, however, while Savedra had gotten out, she still would not obey directives from Jennings, and this difficulty drew Rudisell's attention.

Although looking toward Savedra, Rudisell nonetheless noticed Guerrero's arm coming down in a throwing motion, and heard something hitting a chain link fence about five feet away. Rudisell saw a cigarette lighter bounce off the chain link fence, and saw a rock-like object (later found to be methamphetamine) 10 to 15 feet away on the other side of the fence, rolling away from Guerrero. Rudisell asked Guerrero what she had thrown, but Guerrero did not answer and began to run away. Rudisell pursued Guerrero and caught her by the arm in about 10 feet, but Guerrero continued to struggle with him, and Rudisell fell with her to the ground, spraining his knee in the process.

Rudisell arrested Guerrero for injuring a police officer, possession and possession for sale of narcotics, and also cited her for the missing license plate. In total, between

one and a half and four minutes elapsed from the initial detention of Guerrero's vehicle to the time she threw the narcotics away.

Guerrero testified and stated she had owned the car about two weeks, and had a temporary registration sticker in the rear window. Guerrero also admitted Savedra had initially not obeyed Jennings' directions to roll down her window. The temporary operating permit for Guerrero's vehicle was admitted in evidence.

C. Argument

Defense counsel argued the officers had been pursuing suspected gang activity and had stopped Guerrero because of her ethnicity, and that there was no probable cause for the officers to have ordered Guerrero and Savedra out of the vehicle. The prosecutor argued that the initial detention was proper based on the broken taillight and the lack of a license plate, that the order to exit the vehicle was proper, and that the entire detention preceding the time that Guerrero threw the methamphetamine away had not been unduly prolonged.

D. Ruling

The judge found that the officers had contacted Guerrero for a proper purpose, and that the detention for the Vehicle Code violations was lawful. The court further found that the detention had lasted less than a minute and a half before Savedra's furtive movements caused the officers to order the occupants of the vehicle to exit it. The court further found that under controlling federal and state authorities the directions to the occupants to exit the vehicle were lawful, and thus (1) the initial contact was proper, (2)

the order to exit the vehicle was lawful and (3) the detention was not unduly prolonged. In these circumstances, the court denied Guerrero's motion to suppress.

STANDARD OF REVIEW

""An appellate court's review of a trial court's ruling on a motion to suppress is governed by well-settled principles. [Citations.] [¶] In ruling on such a motion, the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. [Citations.] 'The [trial] court's resolution of each of these inquiries is, of course, subject to appellate review.' [Citations.] [¶] The court's resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard. [Citations.] Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. [Citations.] Finally, its ruling on the third, which is a mixed fact-law question that is however predominantly one of law, . . . is also subject to independent review."" [Citation.]" (*People v. Ayala* (2000) 23 Cal.4th 225, 255.)

DISCUSSION

I

MOTION TO SUPPRESS

Although Guerrero makes two separate arguments concerning the suppression motion, first that the narcotics should have been suppressed because of an unlawful detention, and second that because the detention was unlawful, her conviction for resisting an executive officer should be set aside, we discuss them together, as the second

argument depends upon our agreeing with the first point advanced. As will appear, we do not agree with Guerrero's assertion that her detention by Rudisell was unlawful, and thus we must also reject the second argument Guerrero advances.

The initial decision to detain the vehicle and its occupants was, as the trial court found, lawful: "[The officers'] stop of the vehicle was predicated upon probable cause that a Vehicle Code violation had occurred. Nothing more is required; the stop was proper. (See *Whren v. United States* (1996) 517 U.S. 806, 810 ['As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.'].)" (*People v. Castellon* (1999) 76 Cal.App.4th 1369, 1373.)

As our colleagues in Division Two have put it: "Once having properly detained a vehicle, an officer may ask for and examine the license of the driver and the registration for the vehicle, and may remove the driver from the car in order to do these things. [Citations.]" (*People v. Valencia* (1993) 20 Cal.App.4th 906, 918.)

In this case, of course, there was an even more particularized reason for requesting the occupants to step out of the vehicle: officer safety. As Guerrero concedes, the actions of her companion justified concern by the officers.³ The determination that officer safety required such a step is one properly made by the officers at the scene. On similar facts, holding that a police officer could order the passenger out of the vehicle

³ See, e.g., *People v. Glaser* (1995) 11 Cal.4th 354, 369 [detention of a person who was nearing a house which was about to be searched was lawful, based in part upon the subject's nonresponsiveness to questions from an officer].

during a routine traffic stop, the United States Supreme Court found officer safety outweighed a minimal additional intrusion on the personal liberty of the passenger who is "already stopped by virtue of the stop of the vehicle." (*Maryland v. Wilson* (1997) 519 U.S. 408, 414.) There is no basis under the facts adduced at the suppression hearing to now find the detention of Guerrero was either unlawfully initiated or unduly prolonged, and the trial court's finding to the contrary, supported by substantial evidence, must be upheld. The ruling denying Guerrero's motion to suppress the narcotics evidence was correct.

As we have earlier noted, because the detention was lawful, Rudisell was acting within his authority at the time Guerrero ran from him and resisted his attempts to restrain her, and thus her second argument must fail.

II

POSSESSION CONVICTION

Guerrero also asserts, and the People agree, that we must reverse her conviction of possession of methamphetamine, because it is an offense necessarily included within her conviction of possession of methamphetamine for sale. As our Supreme Court has observed:

"[D]espite the seemingly absolute language of [Penal Code] section 954 ('the defendant may be convicted of any number of the offenses charged'), there is an exception to the general rule permitting multiple convictions. 'Although the reason for the rule is unclear, this court has long held that multiple convictions may *not* be based on necessarily included offenses. [Citations.]' [Citation.] 'The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another

offense, the latter is a necessarily included offense." [Citations.]
[Citation.]" (*People v. Ortega* (1998) 19 Cal.4th 686, 692.)

Because possession of a narcotic for sale necessarily includes the offense of simple possession of the substance (*People v. Magana* (1990) 218 Cal.App.3d 951, 954) we thus must reverse Guerrero's conviction of possession of methamphetamine, and so order.

DISPOSITION

The trial court is directed to prepare an amended abstract of judgment, deleting reference to the conviction for possession of methamphetamine, and to forward the amended abstract to the appropriate authorities. In all other respects the judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

NARES, J.